THE HON'BLE SRI JUSTICE BILAL NAZKI
AND
THE HON'BLE SRI JUSTICE D. APPA RAO

T.R.E.V.C.Nos. 213 and 214 of 2004
AND
WRIT PETITION Nos.
21313, 21314, 21315, 21316, 21317, 21318, 21319,
26921, 26988, 26989, 26990, 26991, 27538 and 27542 of 2005

Date: 30-06-2006.

Between :

M/s.Ushakiron Movies, Begumpet, Hyderabad, rep. by its Manager-Accounts & Authorised Signatory.

.....Petitioner

And

State of Andhra Pradesh, rep. by its State Representative before the Sales Tax Appellate Tribunal, Nampally, Hyderabad.

.....Respondent

For the petitioner : SRI C.NATARAJAN

For the Respondent : SRI K.RAJI REDDY (Spl. Standing Counsel for
Commercial Taxes)

< Gist:

> Head Note:

? CITATIONS:

1. AIR 1989 SC 1834
2. AIR 1959 SC 24
3. (1922) 1 AC 256
4. AIR 1960 SC 1172
5. AIR 1973 SC 2369
6. 77 STC 182
7. 126 STC 114 (SC)
8. 119 STC 182 (SC)
9. 25 STC 60 (SC)
10. 35 STC 445 (SC)

11. 25 STC 26 (SC)
12. 27 STC 127 (SC)
13. 60 STC 213 (SC)
14. 86 STC 539
15. 130 STC 1 (SC)
16. 145 STC 91 (SC)

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–

COMMON JUDGMENT : (Per Hon'ble Sri Justice Bilal Nazki)

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TREVC.Nos.213 and 214 of 2004

In these revisions, the orders passed by the Andhra Pradesh Sales Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal'), dated 03.09.2004 in T.A.Nos.975 and 976 of 2002 have been challenged. It appears that the Tribunal passed common order in T.A.Nos.575-A/01, 576/01, 975/02 and 976/02. Two

revisions have been filed, being T.R.E.V.C. Nos.213 of 2004 and 214 of 2004. T.R.E.V.C.No.213 of 2004 has been filed against the order passed in T.A.No.976 of 2002 and T.R.E.V.C.No.214 of 2004 has been filed against the order passed in T.A.No.975 of 2002. With regard to the other T.As., there are no revisions filed.

The facts, which led to this litigation, are that the petitioner claimed that it was a member of Hindu Undivided Family and was a registered dealer under the Andhra Pradesh General Sales Tax Act, 1957 (hereinafter referred to as 'the Act'). For the assessment years 1995-96 and 1996-97, the petitioner's assessments were completed by the Assistant Commercial Tax Officer by his orders dated 27.03.1996 and 09.06.1997. The petitioner claimed that it was engaged in the business of production of movies, acquisition of satellite rights of feature films produced by the other film producers. Petitioner was also engaged in production of tele-serials and film based programmes. The films produced/acquired or programmes produced were exploited by the petitioner to earn income by telecasting. Depending on the popularity of the programmes, sponsors and advertisers would pay for telecasting them. The programmes are telecast along with advertisement material of sponsors and advertisers. During the relevant years, the petitioner did not have a

satellite telecast facility. 'Eenadu Television' (hereinafter referred to as 'ETV'), a division of 'Ushodaya Enterprises Limited' (UEL) had booked transponder of satellite with 'Videsh Sanchar Nigam Limited' (hereinafter referred to as 'VSNL') and entered into an agreement dated 07.07.1995 with 'Srilanka Telecom' for up-linking video signals from their Earth Station at 'Padukka' in Srilanka to the designated satellite. ETV also entered into similar agreement on 26.06.1996 with 'ST Teleport Private Limited', a Company incorporated in Singapore, having teleport facility at Singapore, to provide up-link facility to the satellite. ETV paid necessary license fee to VSNL for the transponder and fees for up-link facility provided by 'Srilanka Telecom' from its Earth Station at 'Padukka' in Srilanka and by 'ST Teleport Private Limited' from their teleport facility at Singapore. The petitioner entered into a Memorandum of Understanding (hereinafter referred to as 'MOU') on 01.08.1995 and 01.04.1996 with ETV for telecasting the films or programmes produced or acquired by it. ETV had infrastructure and satellite time and the parties were desirous of exploiting the programmes produced by the Petitioner for mutual commercial benefit by telecasting, and earn the advertisement revenue. By this MOU, ETV was required to pay certain minimum guaranteed fee per episode per telecast or re-telecast and 50% as share of advertisement revenue over and above

such minimum guaranteed fee. Such minimum guaranteed fee ranged from Rs.13,000/- to Rs.80,000/- for first telecast and Rs.4,000/- to Rs.25,000/- for re-telecast for other than cinemas and Rs.60,000/- to Rs.90,000/- for first telecast and Rs.10,000/- to Rs.30,000/- for re-telecast for cinema. This arrangement was made under MOU signed on 01.08.1995. Under the arrangement made under MOU dated 01.04.1996, the amounts ranged from Rs.5,000/- to Rs.75,000/- per telecast and Rs.2,500/- to Rs.37,500/- for re-telecast of programmes other than cinema and for cinema, it was from Rs.60,000/- to Rs.90,000/-.

It was the case of petitioner that the MOU was entered into to earn income out of its production activity of films and tele-serials and it had made the arrangement with ETV, which had necessary satellite infrastructure, to telecast programmes during the relevant years. ETV had telecasting facility only at Sri Lanka/Singapore. Therefore, the programmes produced had to be moved to Sri Lanka or Singapore in the form of software copied on discs or other media. As per the terms of MOU, the rights in the programmes always vested in the petitioner. ETV was entrusted with the responsibility of telecasting. The revenue received by ETV was to be shared and ETV had to pay a minimum guaranteed fee per telecast and re-

telecast. The petitioner had to incur all the expenditure in procurement and production of films, and the ETV had to do canvassing and telecasting of the programmes. The petitioner would raise bills every month for the program software telecast by ETV, and ETV would pay share of advertisement revenue on or before 15th of following month.

The case of the petitioner had been that its entire activity of producing and telecasting the films was with an intention to earn income from advertisements and sponsors. As it had no satellite facility, it associated with ETV who had the satellite time and infrastructure. The programmes were accordingly entrusted to ETV who copied them with their own equipment and carried them to Sri Lanka/Singapore via Chennai and telecast the programmes. In this transaction, there was no transfer of right to use goods affected by the petitioner in favour of ETV and such a transaction would not attract provisions of the Act.

The Commercial Tax Officer visited the business premises of the petitioner on 17.12.1996. He inspected the documents, referred to the terms of MOU and issued show cause notices dated 30.06.1997. He proposed to levy tax of Rs.31,52,990/- for the year 1995-96 and

Rs.99,77,044/- for 1996-97. The petitioner filed objections on 08.07.1997. Besides raising some defences, the petitioner also questioned the jurisdiction of Commercial Tax Officer. The Commercial Tax Officer, by separate orders on 23.10.1997, rejected the contentions of petitioner and levied tax as proposed for both the assessment years. Aggrieved by the orders, the petitioner filed appeals before the Appellate Deputy Commissioner. The Appellate Deputy Commissioner, on 17.03.1998, remitted the matter back to the assessing authority and set aside the order of the assessing authority. However, the Appellate Deputy Commissioner rejected the contention raised by the petitioner on the question of jurisdiction of Commercial Tax Officer. The petitioner filed appeals before the Tribunal in T.A.Nos.575-A and 576/2001, contending that the Appellate Deputy Commissioner ought to have upheld the petitioner's contention with regard to the jurisdiction of the Commercial Tax Officer. The petitioner contended that the Appellate Deputy Commissioner should have allowed the appeals on merits instead of remanding them. While the matters were pending, the Additional Commissioner of Commercial Taxes issued show cause notice on 29.04.2000 proposing to revise the order of the Appellate Deputy Commissioner, observing that the Appellate Deputy Commissioner could have decided the matters

instead of remanding them. The petitioner filed objections on 06.07.2001. The Additional Commissioner, by order dated 02.03.2002, rejected all the contentions of the petitioner and restored the order of Commercial Tax Officer, dated 23.10.1997. Aggrieved by the order of Additional Commissioner, the petitioner filed T.A.Nos.975 and 976 of 2002 in the Tribunal. The petitioner also filed an application for stay of collection of disputed tax. The Full Bench of the Tribunal heard the matter and reserved the judgment on appeals on 25.03.2004. By order dated 26.03.2004, the Tribunal disposed of the TMPs, directing the petitioner to pay 1/4th of the disputed tax. The petitioner thereafter filed Writ Petition No.6135 of 2004, which was disposed of on 01.04.2004, directing the Tribunal to dispose of the appeals at an early date and it was directed that the conditional order passed by the Tribunal should not be given effect to. It is submitted that the matter had been heard by a Full Bench of the Tribunal, but the judgment was pronounced only by two members of the Tribunal, as one of the members who belonged to the Income-Tax Department, in the meantime, had gone back to his Department. The judgment was delivered on 03.09.2004 dismissing the appeals filed by the petitioner. Therefore, these revisions were filed.

The question which needs an answer from this Court is, whether within Article 366 (29A) (d) of the Constitution of India read with explanation IV to Section 2(n) of the Andhra Pradesh General Sales Tax Act, the petitioner and ETV were involved in transfer of right of use of goods.

We have heard learned counsel for the parties.

The learned senior counsel appearing for the petitioner submits that there was no transfer as the petitioner and ETV were a Hindu Undivided Family and two concerns were created and as a matter of fact, they were running a joint venture and therefore, there was no transfer. It was a case where 'A' was transferring to 'A' in terms of a mutual agreement. A plea was also taken that what were transferred, were not goods. But the learned senior counsel fairly gave up this contention. On the other hand, the learned Advocate-General appearing for the respondent, submits that the MOU itself envisages a transfer, and transfer of right of use of goods is inherent in the agreement itself. These are the broad contentions of the learned counsel for the parties.

In the light of these contentions, it will be necessary to have a look at the MOU. This MOU was arrived into between M/s.Eenadu Television and M/s.Ushakiron

Movies. On behalf of Eenadu television, the agreement was executed by Sri Ch.Suman and on behalf of Ushakiron Movies, it was executed by Sri Ramoji Rao as *Kartha* of HUF. The object of entering into the MOU is given in the preamble of the MOU and it states –

> "WHEREAS THE FIRST PARTY has infrastructure and satellite time to telecast programmes through its T.V. Channel - EENADU TELEVISION and the SECOND PARTY produces various programmes and also has right relating to telecast of feature films/songs for the channel, and the parties hereto are desirous of exploiting the said programmes for mutual commercial benefit by `telecasting and earning advertisement revenue.
>
> AND WHEREAS both the parties have agreed to the various terms and conditions mentioned below relating to their respective obligations.
>
> 1. The SECOND PARTY shall provide to the FIRST PARTY software, for telecast on its Television Channel, consisting of Telugu feature films, Telugu dubbed versions of programmes produced in other languages.
>
> 2. a) The SECOND PARTY shall also produce and
>
> provide quality programme software to the FIRST PARTY for telecast on its

T.V.Channel.

b) The FIRST PARTY will canvas for advertisements insertion during the programme and insert such advertisements in the programme capasule sent for telecast. The canvassing for advertisements and recovery of advertisement revenue will be done by FIRST PARTY with its efforts and responsibility.

3. The SECOND PARTY shall held in itself all the rights in the feature films, Telugu dubbed programmes and other software provided to the FIRST PARTY for telecasting.

4. The FIRST PARTY shall be entitled to telecast the feature films and the programme software provided by the SECOND PARTY during the pendency of this agreement or the period extended by any renewed agreement.

5. All the advertisement revenues concerning the programmes shall be received by FIRST PARTY. The FIRST PARTY shall pay the SECOND PARTY a minimum guarantee fee for the programme software provided by it. Since the SECOND PARTY incurs all expenditure in the procurement/production of films/programmes and entirely depends

on canvassing and telecasting of the programmes by the FIRST PARTY, a share of advertisement revenues at the rates indicated in the Schedule annexed to this Memorandum of Understanding, shall be paid by the FIRST PARTY to the SECOND PARTY provided always the said rates may be reviewed and revised from time to time. The payment by the FIRST PARTY for telecasting other programmes will be as mutually agreed.

PROVIDED that the SECOND PARTY shall be entitled to receive the minimum guarantee fee and share of advertisement revenue at the rates in vogue on the date of telecast/retelecast.

Further provided that wherever the FIRST PARTY desires to telecast programmes involving higher cost of production, the minimum guarantee or the share of advertisement revenue for such programmes may be determined separately by mutual consent.

6. The SECOND PARTY shall raise bills every month for the programme software telecast by the FIRST PARTY for the Minimum Guarantee Fee agreed herein and the FIRST PARTY shall pay the share of the SECOND PARTY in advertisement revenue on or before 15th of following month.

7. The programme software will be copied by the FIRST PARTY with their equipment from time to time from the programme master available with the SECOND PARTY."

Under Article 366 (29A) (d), tax on sale or purchase of goods includes a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

Section 2(n) of the Act gives definition of 'sale' as under –

> " "Sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods [whether as such goods or in any other form in pursuance of a contract or otherwise'] by one person to another in the course of trade or business, for cash, or for deferred payment, or for any other valuable consideration or in the supply or distribution of goods by a society (including a co-operative society), club, firm or association to its members, but does not include a mortgage, hypothecation or pledge of, or a charge on goods."

Explanation IV to Section 2(n) lays down –

> "A transfer of right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable

consideration shall be deemed to be a sale”

Explanation IV to Section 2(n) of the Act is similar to Article 366 (29A) (d) of the Constitution.

The learned senior counsel for the petitioner contended that the Tribunal failed to appreciate that the programmes were entrusted to ETV only for limited purpose of telecasting and there was no transfer of right to use, to the exclusion of the petitioner. He also contended that the right of exploitation of the programmes to ETV had not, in fact, been transferred and the MOU dated 01.04.1996 was a joint enterprise in which the petitioner had to contribute the software and ETV had to contribute their rights over transponder for up-linking facility, therefore, it would not attract the provisions of Section 5-E of the Act. On the other hand, the learned Advocate-General submits that if we go by the terms of MOU, the transfer of right to use goods was inherent in its terms and the transfer was complete and irrevocable, and as such, it would attract the provisions of Section 5-E of the Act.

If we analyze various terms of the MOU, it can be found that in the preamble it was stated that the First Party was desirous of exploiting the programmes, which it was producing, for mutual commercial benefit. The first Clause of the agreement declares that the Second Party shall

provide software to the First Party for telecast on its Television Channel, consisting of Telugu feature films, Telugu dubbed versions of programmes produced in other languages. Clause 2(a) declares that the Second Party should produce and provide quality programme software to the First Party for telecast on its T.V. Channel, which would mean that after the Second Party produced the programmes, it had to transfer them to the First Party for being telecast. Whether it was done in Hyderabad, Sri Lanka or in any other country was immaterial for the purposes of this MOU. The First Party was only allowed to canvass for advertisement insertion programmes and it could insert advertisements in the programme capsule sent for telecast by the Second Party. The MOU also discloses that the Second Party would hold itself all the rights in the feature films, telugu dubbed programmes and other software provided to the First Party for telecasting, but at the same time, First Party was entitled to use and telecast the feature films and the programme software provided by the Second Party. There was a minimum guaranteed amount which had to be paid by the First Party to the Second Party even if the first party, after using the programmes,

did not receive this money. Therefore, the transfer of right to use from Second Party to First Party was absolute, and even a minimum guaranteed amount had to be paid. In

addition to minimum guaranteed fee, amounts had to be paid depending on the earnings by the First Party.

The contention raised by the learned counsel for the petitioner that there was no facility of satellite available to the Second Party, therefore, it entered into an agreement with the First Party, is not reflected in the MOU. MOU merely says that First Party has T.V. Channel being ETV and the Second Party was producer of films and programmes, therefore, the Second Party wanted to use for its profits, the T.V. channel i.e. ETV, which was owned by the First Party. Whether the First Party was using a satellite which was in Singapore or in Srilanka, that was immaterial for the purposes of the MOU and the Tribunal also considered these contentions. In sub-para 2 of para 25, the Tribunal found –

> "We are also unable to accept the contention of the appellant that there is only joint exploitation of the software produced by the appellant. The software programmes copied from programme master by the ETV are not being given to other telecasting parties like Gemini, MAA, Star TV etc. The appellant produces the software programmes and the ETV telecasts the same. The monies generated in these activities of telecasting are shared by both of them in the agreed manner. The assessee only holds title to the software programmes and the exploitation rights there

of are with the ETV by means of telecasting. There is nothing on record to show that the appellant can give these software programmes to any other party for telecasting already when they are given to ETV. Hence, the term No.3 in MOU shall be read in that manner. That term shall be read along with term No.4 for proper appreciation of the intention of the parties."

In sub-para 5.1 of para 25, the Tribunal found –

"Appellant further contended that if there is no telecast of any software programme, the appellant will not get even minimum guarantee fees. But there is no supporting authority in MOU to support this contention. The information furnished by the assessee which is available in reassessment file at pages 137 to 139 do not indicate the same. Even the sale bills copies raised by the appellant also indicate the same that for no telecasting of software programmes no consideration is agreed. The said sale bills are available in the assessment file. Besides a concession given to the transferee of right in the case of non-telecasting of programme in the form of waiver of minimum guarantee fees cannot alter the true nature of transaction. The taxable event is the transfer of right to use the goods. Whether the transferee actually uses the goods under transfer of right to use after the taxable event and pays the money cannot alter the true nature of the transaction. Actual exercise of right to use the goods and waiver of minimum

guarantee fees is not the ingredients of section 5E and is irrelevant as held in the dissenting judgment, which is not in clash with majority judgment reported in 119 STC 182 at 224 Para 86. The waiver of minimum guarantee fees in the event of non-telecasting of programme would amount to one of the deemed sale non-decisive condition. The only legal implication of non-telecasting of the software programme is that the appellant will not get the agreed fees. Besides the non-telecasting of software programme which is under transfer of right to use is only a very remote possibility. Hence we are unable to accept this contention of the appellant also."

Again in para 31, the Tribunal observed –

"……Here, in the instant case, admittedly the contract was entered into between the appellant and the ETV at Hyderabad. It is already held supra that the said contract was for transfer of right to use the goods from the appellant to ETV. It is also not disputed that ETV in pursuance of the said contract copied the programmes from the master cassette for the purpose of telecast. Therefore, the moment the programme is copied it amounts to delivery of the goods. Therefore, in either event the taxable event on the deemed sale viz., transfer of right to use goods occurred within the State of Andhra Pradesh. Merely, because ETV took the copy outside the State for telecast, it cannot be said that the transfer

> of right to use goods was in the course of inter-state trade and commerce. As seen from the terms of the MOU, it is nowhere stated that ETV has to take the goods outside the State for purpose of telecast. So far as the appellant is concerned, it is immaterial as to from where the programmes would be telecast. Therefore, it cannot be said that the deemed sale in the instant cases attracts Sec.3(a) of the CST Act."

In the light of what has been stated by us hereinabove, and the findings of the Tribunal, let us examine the judgments which have been referred to by the learned counsel for the parties.

On the question of purport, scope and intent of effect of MOU, the learned senior counsel for petitioner has referred to **Odgers' Construction of Deeds and Statutes**. At page 150 of the First Indian Reprint of 1996, it has been stated that where operative part was unambiguous, the recitals have no effect, and it is further stated that the reason of the rule is because it is impossible by a recital to cut down the plain effect of the operative part of a deed. This principle had been taken from **Holiday v. Overton (1852) Beav, 467 at p.470 *per* Romilly M.R.**

The learned senior counsel for petitioner has

specifically drawn the attention of the Court to the observations of Lord Davey, which are also quoted in the book. His Lordship said –

> "I take it to be a settled principle of law that the operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down or qualified by a recital or narrative of intention."

There is no quarrel with the principle laid down, but what we have found from MOU is that the operative part as well as other terms and conditions of the MOU point towards the same thing that there has been a transfer of goods and the object was that the First Party had a satellite time to telecast programmes through its T.V. Channel and the Second Party was producing the programmes, and therefore, it was transferring the right to use of goods to the First Party. To achieve this objective, other terms and conditions were laid in the MOU, as such, there is no conflict between the terms and conditions of the MOU with the objective mentioned in the preamble of the MOU.

The learned senior counsel for petitioner has relied on a judgment in the case of **Provash Chandra Dalui v. Biswanath Banerjee**[1]. In para 9 of the judgment, the

Supreme Court held –

> " 'Ex praecedentibus et consequentibus optima fit interpretatio'. The best interpretation is made from the context. Every contract is to be construed with reference to its object and the whole of its terms. The whole context must be considered to ascertain the intention of the parties. It is an accepted principle of construction that the sense and meaning of the parties in any particular part of instrument may be collected 'Ex praecedentibus et consequentibus;' every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that is possible. As Lord Davey said in N.E.Railway v. Hastings, (1900) AC 260 9267), "The deed must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible". In construing a contract the Court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear there is very little the Court can do about it. In the construction of a written instrument it is legitimate in order to ascertain the true meaning of the words used and if that be doubtful it is legitimate to have regard to the circumstances surrounding their creation and

the subject matter to which it was designed and intended they should apply."

Learned counsel has also relied on the judgment of Supreme Court in **Radha Sundar Dutta v. Mohd. Jahadur Rahim**[2], which, as a matter of fact, relied on the judgment in **Forbes v. Git**[3] and quoted the following passage from that judgment—

"IF in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. In this case the two clauses cannot be reconciled and the earlier provision in the deed prevails over the later."

He has also relied on another judgment of Supreme Court in **Commissioner of Income-tax, Bombay North, Kutch and Saurashtra v. Smt.Indira Balkrishna**[4]. Special reliance was laid by the learned counsel on paragraphs 9 and 11 of the judgment, which read as under –

"9. It is enough for our purpose to refer to three decisions : In re, B. N. Elias, 1935-3 ITR 408 (Cal); Commissioner of Income-tax, Bombay v. Laxmidas Devidas, 1937-

5 ITR 584 (Bom) : and in re. Dwarkanath Harishchandra, 1937-5 ITR 716 : (AIR 1938 Bom 353). In 1935-3 ITR 408 (Cal) Derbyshire, C. J. rightly pointed out that the word "associate" means, according to the Oxford dictionary, "to join in common purpose, or to joint in an action." Therefore, an association of persons must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be on the object of which is to produce income, profits or gains. This was the view expressed by Beaumout, C. J. in 1937-5 ITR 584 (Bom) at p. 589 and also in 1937-5 ITR 76 : (AIR 1938 Bom 353). In 1935-3 ITR 408 (Cal) Costella, J. put the test in more forceful language. He said : "It may well be that the intention of the legislature was to hit combinations of individuals who were engaged together in some joint enterprise but did not in law constitute partnership.....When we find....that there is a combination of persons formed for the promotion of a joint enterprise....then I think no difficulty arises in the way of saying that these persons did constitute an association....."

“11. Learned counsel for the appellant has suggested that having regard to Ss. 3 and 4 of the Indian Income-tax Act, the

> real test is the existence of a common source of income in which two or more persons are interested as owner or otherwise and it is immaterial whether their shares are specific and definite or whether there is any scheme of management or not. He has submitted that if the persons so interested come to an arrangement, express or tacit, by which they divide the income at a point of time before it emanates from the source, then the association ceases; otherwise it continues to be an association. We have indicated above what is the crucial test in determining an association of persons within the meaning of S. 3, and we are of the view that the test suggested by learned counsel for the appellant are neither conclusive nor determinative of the question before us."

We do not think, in the present context, the principles laid down in this judgment are relevant.

Reliance is also placed on the judgment in **G. Murugan & Brothers v. Commissioner of Income-tax, Madras**[5]. In para 7 of this judgment, the Supreme Court held –

> "7. The expression 'Association of Persons' is not a term of art. That expression has come up for consideration before this

Court in more than one case. In Commr. of Income-tax, Bombay, North, Kutch and Saurashtra v. Indra Balkrishna (39 ITR 546 = AIR 1960 SC 1172), this Court after referring to the various judgments, observed thus:

"It is enough for our purpose to refer to three decisions:
In re. B. N. Elias, (1935) 3 ITR 408 (Cal); Commr. of Income-tax v. Laxmidas Devidas (1937) 5 ITR 584 (Bom.) and In re: Dwarkanath Harishchandra Pitale, (1937) 5 ITR 716 = (AIR 1938 Bom. 353). In re: B. N. Elias, Derbyshire, C. J., rightly pointed out that the word "associate" means, according to the Oxford Dictionary, "to join in common purpose, or to join in an action. Therefore, an association of persons must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profits or gains. This was the view expressed by Beaumont, C. J., in Commr. of Income-tax v. Lakshmidas Devidas, at page 589 (1937) 5 ITR 584 (Bom.) and also in In re: Dwarkanath Harishchandra Pitale, 5 ITR 716 = (AIR 1938 Bom. 353) In re B. N. Elias, (1935) 3 ITR 408 (Cal.)

Costello, J., put the test in more forceful language. He said: "It may well be that the intention of the Legislature was to hit combinations of individuals who were engaged together in some joint enterprise but did not in law constitute partnerships.....when we find,....that there is a combination of persons formed for the promotion of a joint enterprise...then I think no difficulty arises whatever in the way of saying that....these persons did constitute an association.....".

We think that the aforesaid decision correctly lays down the crucial test for determining what is an 'Association of Persons' within the meaning of Section 3 of the Income-tax Act, and they have been accepted and followed in a number of later decisions of different High Courts to all of which it is unnecessary to call attention. It is, however, necessary to add some words of caution here. There is no formula of universal application as to what facts, how many of them and of what nature, are necessary to come to a conclusion that there is an association of persons within the meaning of section 3; it must depend on the particular facts and circumstances of each case as to whether the conclusion can be drawn or not."

Coming to the question of transfer of rights in goods, the learned senior counsel for petitioner has referred to a judgment of this Court in **Rashtriya Ispat Nigam Ltd. V. Commercial Tax Officer, Company Circle, Visakhapatnam**[6], in which the petitioner Rashtriya Ispat Nigam Ltd. allotted different works of the project to different contractors. To facilitate the execution of work by contractors, the petitioner supplied machinery to Contractors for the purpose of being used in the execution of the contracted works and the petitioner received charges for the same. The Commercial Tax Department made assessments levying tax on the hire charges under Section 5-E of the Act. This action was challenged and was considered by the High Court. The High Court held that the machinery was supplied by the petitioner to the contractors in order to get its own work done and therefore, it could not be taxed under Section 5-E of the Act. The judgment would, certainly, not apply to the facts of the present case. This judgment was approved by a judgment of Supreme Court in **State of A.P. v. Rashtriya Ispat Nigam Ltd.**[7].

The learned counsel has also relied on another judgment of the Supreme Court in **20th Century Finance**

Corporation Ltd. v. State of Maharashtra[8]. In Paras 20, 27 and 32 of this judgment, the Court held–

> "20. While examining the power of State Legislatures under entry 54 of List II in earlier part of this judgment, we have noticed that the *situs* of the sale or purchase is wholly immaterial as regards the inter-State trade or commerce, as held in *Bengal Immunity Co. Ltd.'s case* [1955] 6 STC 446 (SC) ; [1955] 2 SCR 603. Further, the State Legislature cannot by law treat sales outside the State and sales in the course of import as "sales within the State" by fixing the *situs* of sales within its State in the definition of sale, as it is within the exclusive domain of the appropriate Legislature, i.e., Parliament, to fix the location of sale by creating legal fiction or otherwise."

> "27. Article 366(29A)(d) further shows that levy of tax is not on use of goods but on the transfer of the right to use goods. The right to use goods accrues only on account of the transfer of right. In other words, right to use arises only on the transfer of such a right and unless there is transfer of right, the right to use does not arise. Therefore, it is the transfer which is *sine qua non* for the right to use any goods. If the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed. As soon as the contract is

executed, the right is vested in the lessee. Thus, the *situs* of taxable event of such a tax would be the transfer which legally transfers the right to use goods. In other words, if the goods are available irrespective of the fact where the goods are located and a written contract is entered into between the parties, the taxable event on such a deemed sale would be the execution of the contract for the transfer of right to use goods. But in case of an oral or implied transfer of the right to use goods it may be effected by the delivery of the goods."

"32. Coming to the question that a transaction in question is in the nature of a contract of bailment, it is true that the High Court of Bombay in the judgment under appeal has taken the view that the transactions of the transfer of the right to use goods are in the nature of bailment. If such a view is taken then the State would not have the power to levy sales tax on such transactions. Unless such transaction is held to be a sale or deemed sale in law and it is only then the State Legislature would be competent to enact law to levy tax under entry 54 of List II of the Seventh Schedule. The levy of tax is not on use of goods but on the transfer of right to use goods. The High Court proceeded on the footing that the transfer of right to use is different from sale or

deemed sale without considering the legal fiction engrafted in clause (29A) of article 366 of the Constitution. We are, therefore, of the view that the reasoning of the High Court in upholding the Explanation to section 2(10) of the Act is not tenable in law. This question is also related to another question which falls to be considered, namely, whether the State of Maharashtra can levy tax on the transaction which is an inter-State sale. The Bombay High Court expressed the view that in case of transfer of right to use goods when agreement is made in one State for giving delivery of goods for use by the lessee in another State, the movement precedes a transfer of right to use, i.e., the movement is antecedent to the completed transaction and only upon delivery of goods the transfer of right to use is completed as the transfer of right to use goods is not concluded merely by execution of an agreement or document. In view of the fact that the transaction in question is deemed sale and definition of "sale" in the Central Sales Tax Act is not amended, the said reasoning of the High Court is not only erroneous, but runs contrary to two decisions of this Court – (i) *Builders Association of India [1989] 73 STC 370; (1989) 2 SCC 645, and (ii) Gannon Dunkerley and Co. [1993] 88 STC 204 ; (1993) 1 SCC 364* wherein, it was categorically held that, in the determination of inter-State character of

> sale the *situs* of sale is immaterial. When goods are entrusted to a common carrier for delivery, it amounts to delivery to consignee. If it takes place outside the State, the fact that subsequently goods have reached the State where they are put to use, cannot be ground for determining the tax liability on the ground that the goods are located in that State for use."

This judgment, in our view, helps the respondents rather than the petitioner. All the tests laid down by this judgment for ascertaining whether there was transfer of right to use, are satisfied in the present case as we have discussed hereinabove.

The learned counsel has also relied on a judgment in **Hanuman Mining Corporation Ltd. v. Commissioner of Sales Tax, Madhya Pradesh**[9], in which, the Supreme Court held –

> "The interpretation of Section 3(a) of the Central Sales Tax Act was the subject-matter of consideration by this Court in *Tata Iron & Steel Co. Ltd. v. S.R.Sarkar[1960] 11 STC 655*, and Shah, J., speaking for the majority of the Bench, observed as follows :
>
> > "In our view, therefore, within clause (b) of section 3 are included sales

> in which property in the goods passes during the movement of the goods from one State to another by transfer of documents of title thereto; clause (a) of section 3 covers sales, other than those included in clause (b), in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale, and property in the goods passes in either State."

This observation of Shah, J., was cited with approval by this Court in *Cement Marketing Co. v. State of Mysore [1963] 14 STC 175* and again in *State Trading Corporation v. State of Mysore [1963] 14 STC 188*. In the latter case Sarkar, J., observed thus :

> "The question then is, did the sales occasion the movement of cement from another State into Mysore within the meaning of the definition ? In *Tata Iron & Steel Co. Ltd. v. S.R. Sarkar [1960] 11 STC 655*, it was held that a sale occasions the movement of goods from one State to another within section 3(a) of the Central Sales Tax Act, when the movement 'is the result of a covenant or incident of the contract of sale'. That the cement concerned in the disputed sales

was actually moved from another State into Mysore is not denied. The respondents only contend that the movement was not the result of a covenant in or an incident of the contract of sale."

In the present case the entire turnover of the appellant consisted of sale of manganese ore to eight firms outside the State, some of Bombay and some of Nagpur. There was a written contract of sale between the appellant and each of these firms, on more or less identical terms, the only material difference being that under two of the contracts the rate was fixed f.o.r. Bombay and under the rest f.o.r. Katanjhari, which is in the State of Madhya Pradesh. There is no dispute that the ore was loaded by the appellant into wagons at Katanjhari indented by the buying firm. There is also no dispute that the wagons went out of the State to Nagpur and Bombay respectively, the buyer acting as consignor and consignee. The only question to be examined is whether the movement of goods from the State of Madhya Pradesh into the State of Maharashtra was occasioned by the terms of the respective contracts. There was an important stipulation in each of the contracts that the first weight at Gondia weigh-bridge shall be the weight for the purpose of the contract. This stipulation

in the contract necessitated the movement of the wagons from the State of Madhya Pradesh to the Gondia weigh-bridge for the fulfillment of the terms of the contract as to the payment of the price. Gondia weigh-bridge was the basis of the fixation of price of the manganese ore and therefore the parties necessarily contemplated the movement of the goods to the Gondia weigh-bridge and the weighment of the goods at Gondia in performance of the terms of the contract. In our opinion, the movement of goods across the frontier was a direct and necessary consequence of the important covenant with regard to the fixation of price. It follows that the sales under the eight contracts were inter-State sales within the language of section 3(a) of the Central Sales Tax Act and were not liable to be taxed under the Madhya Pradesh General Sales Tax Act. In our opinion, the present case falls within the ratio of the decision of this court in *Commissioner of Sales Tax, M.P., v. Allwyn Cooper [(1970) 25 STC 26]*, in which the relevant clauses of the contract of sale were almost identical with the terms of the contract of sale in the present case. The High Court has followed its previous decision in *Commissioner of Sales Tax, Madhya Pradesh v. Nathani Brothers [(1968) 21 STC 465]*. But for the reasons already

given we consider that the decision in *Commissioner of Sales Tax, Madhya Pradesh v. Nathani Brothers* was not correct."

Counsel for petitioner has also relied on another judgment of Supreme Court in **Oil India Ltd. v. The Superintendent of Taxes**[10]. In this judgment, the Court held –

"Even though clause 7 of the supplemental agreement does not expressly provide for movement of the goods, it is clear that the parties envisaged the movement of crude oil in pursuance to the contract from the State of Assam to the State of Bihar. In other words, the movement of crude oil from the State of Assam to the State of Bihar was an incident of the contract of sale. No matter in which State the property in the goods passes, a sale which occasions "movement of goods from one State to another is a sale in the course of inter-State trade". The inter-State movement must be the result of a covenant express or implied in the contract of sale or an incident of the contract. It is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement. It is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It would

be enough if the movement was in pursuance of and incidental to the contract of sale."

Reliance has also been placed on another judgment of Supreme Court in **Commissioner of Sales Tax v. Allwyn Cooper**[11], in which, the Supreme Court held –

> "So far as these two contracts of sales are concerned, it is manifest that the first weighment at the Gondia weigh-bridge was the basis of fixation of price and the parties therefore necessarily contemplated the movement of the goods to the Gondia weigh-bridge and the weighment of the goods at Gondia in fulfillment of the terms of the contract. In our opinion, this is a very important feature of the two contracts and in order to fulfil the requirement of the clause, the seller had necessarily to move the goods by rail across the frontier of Madhya Pradesh. In regard to these two contracts therefore the movement of goods was a direct and necessary consequence of the important covenant with regard to the fixation of price. It follows that the sales under these two contracts were inter-State sales within the language of section 3(a) of the Central Sales Tax Act and were not liable to be taxed under the Madhya Pradesh General Sales Tax Act."

Another judgment upon which the learned senior counsel has placed reliance is in the case of **The State of**

Bihar v. Tata Engineering & Locomotive Co., Ltd.[12], in which, the Court held –

> "The decided cases establish that sales will be considered as sales in the course of export or import or sales in the course of inter-State trade and commerce under the following circumstances :
>
> (1) When goods which are in export or import stream are sold ;
>
> (2) When the contracts of sale or law under which goods are sold require those goods to be exported or imported to a foreign country or from a foreign country as the case may be or are required to be transported to a State other than the State in which the delivery of goods takes place, and
>
> (3) Where as a necessary incidence of the contract of sale goods sold are required to be exported or imported or transported out of the State in which the delivery of goods takes place."

Counsel for petitioner has also relied on a decision of Supreme Court in the case of **State of Orissa v. Titaghur Paper Mills Co. Ltd.**[13]**.** In pages 289 and 290, the Court held–

"The above rule enunciated by this Court in that case falls into two parts, namely, (1) a document should be so interpreted as to bring it within the ambit of a particular statute relevant for the purpose of the dispute before the Court, and (2) in order to do so, the Court can look at only such of the clauses of the document as also to just one or more of the consequences flowing from the document which would fit in with the interpretation which the Court wants to put on the document to make that statute applicable. The above principle of interpretation cannot be accepted as correct in law. It is fraught with considerable danger and mischief as it may expose documents to the personal predilections and philosophies of individual judges depending upon whether according to them it would be desirable that documents of the type they have to construe should be made subject to a particular statute or not. The result would be that a document can be construed as amounting to a grant of a benefit to arise out of land when the question before the Court is whether proprietary rights and interests in estates have been abolished and the same document or a document having the same tenor could be construed as a contract of sale of goods when the question is whether the amounts payable thereunder are exigible to sales tax or purchase tax, making the interpretation of the document dependent upon the personal view of the judges with respect to the legislation in question. In the very case which we are considering, namely, the ***Orient***

Paper Mills' case [1977] 40 STC 603 (SC); [1977] 2 SCR 149 as shown by the very first sentence in the judgment, this Court obliquely expressed its disapproval of the transactions of the type represented by the document before it. That sentence is as follows [at page 604 (STC), 150 (SCR)] :

> "The State of Madhya Pradesh, blessed with abundant forest wealth, whose exploitation, for reasons best known to that Government, was left in part to the private sector, viz., the respondent, Orient Paper Mills……."

We may point out here that in making this observation the Court overlooked three important aspects of the matter, namely, (1) it was a matter of policy for the State to decide whether such transactions should be entered into or not, (2) the transaction was entered into by the State so that a paper mill could be started in the State as shown by the various terms of the said agreement and thus was an encouragement to setting up of industries in the State, and (3) the transaction ensured employment for the people of the area because the said agreement expressly provided that the respondent was to engage minimum 50 per cent of the labour for the working of the contract area from the local source if available.

Just as a document cannot be interpreted by picking out only a few clauses

ignoring the other relevant ones, in the same way the nature and meaning of a document cannot be determined by its end-result or one of the results or consequences which flow from it. If the second part of the above rule were correct, the result would be startling. There would be almost no agreement relating to immovable property which cannot be construed as a contract of sale of goods. Two instances would suffice to show this. If a man were to sell his building to another and the deed of sale were to provide that the building should be demolished and reconstructed and the price should be paid to the vendor partly in money and partly by giving him accommodation in the new building, according to this rule of interpretation adopted by the Court in the ***Orient Paper Mills'*** case *[1977] 40 STC 603 (SC) ; [1977] 2 SCR 149* it would for the purpose of sales tax be a sale of goods because the old building when demolished would result in movable property, namely, debris, doors, windows, water pipes, drainage pipes, water tanks, etc., which would be sold by the purchaser as movables. Similarly, if a man were to give a lease of his orchard or field, the lessee would be entitled to the fruits already in existence as also to the fruits which would come into existence in the future and equally in the case of a field the same would be the case with respect to the crop growing in the field as also the crops to grow thereafter. The fruits and crop, whether existing or future, when plucked or harvested, would be movable property and would be sold as such by the

lessee ; but on the second part of the rule of interpretation laid down in the ***Orient Paper Mills'*** case *[1977] 40 STC 603 (SC) ; [1977] 2 SCR 149*, the document, indisputably a lease of immovable property, would for the purposes of sales tax law be a sale of goods. In looking merely at the end-result of the agreement before it, namely, that the bamboos would be cut and then would be goods in the hands of the respondent and holding therefrom that the transaction was exigible to sales tax, the Court overlooked what had been firmly established by the decision of the five-Judge Bench of this Court in ***State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.*** *[1958] 9 STC 353 (SC) ; [1959] SCR 379* that both the agreement and the sale must relate to the same subject-matter and, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another. This principle has been consistently followed and applied by this Court [see, for instance, ***Commissioner of Sales Tax, M.P. v. Purshottam Premji*** *[1970] 26 STC 38, 41 (SC)]*. Incidentally, we may also point out that in the ***Orient Paper Mills'*** case *[1977] 40 STC 603 (SC) ; [1977] 2 SCR 149*, this Court itself had reservations as regards what it was deciding as is shown by its statement that "in the jural cosmos of relativity, our observations here may not be good currency beyond the factual-legal boundaries of sales tax situations under a specific statute". We are constrained to observe that they are not "good currency" so far as even those situations are concerned."

In page 291, the Court observed –

> "A Chameleon may change its colour according to its surroundings but a document is not a chameleon to change its meaning according to the purpose of the Statute with reference to which it falls to be interpreted and if documents having the same tenor are not to be construed by Courts in the same way, it would make for great uncertainty and would introduce confusion, leaving people bewildered as to how they should manage their affairs so as to make their transactions valid and legal in eye of the law."

The learned Advocate-General appearing for the respondent has relied on a judgment of this Court in **Industrial Oxygen Company Pvt. Ltd. v. State of Andhra Pradesh**[14]. This judgment mainly relied on **Rashtriya Ispat Nigam Ltd.** case (6th supra).

The learned Advocate-General has also relied on another judgment of Supreme Court reported in **State of Uttar Pradesh v. Union of India**[15]. However, this judgment has been over-ruled by the Supreme Court in **Bharat Sanchar Nigam Ltd. v. Union of India**[16]

For these reasons, we do not think that any illegality

has been committed by the Tribunal in passing the orders impugned in these revisions. Both the Revisions are accordingly dismissed. No costs.

WRIT PETITION Nos.
21313, 21314, 21315, 21316, 21317, 21318, 21319,
26921, 26988, 26989, 26990, 26991, 27538 and 27542 of 2005

These writ petitions are against the orders passed in consequence to the orders passed by the Tribunal which were under challenge before us in T.R.E.V.C.Nos. 213 and 214 of 2004. Since the revisions have been dismissed, these writ petitions also deserves to be dismissed and are accordingly dismissed. No costs.

(BILAL NAZKI, J)

Date: 30th June 2006

(D. APPA RAO, J)

N.B:
L.R. copies to be marked.
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ajr

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[1] AIR 1989 SC 1834
[2] AIR 1959 SC 24
[3] (1922) 1 AC 256
[4] AIR 1960 SC 1172
[5] AIR 1973 SC 2369
[6] 77 STC 182

[7] 126 STC 114 (SC)
[8] 119 STC 182 (SC)
[9] 25 STC 60 (SC)
[10] 35 STC 445 (SC)
[11] 25 STC 26 (SC)
[12] 27 STC 127 (SC)
[13] 60 STC 213 (SC)
[14] 86 STC 539
[15] 130 STC 1 (SC)
[16] 145 STC 91 (SC)